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No. 98 - 131

IN THE

Supreme Court of the United States

October Term 1998

UNITED STATES OF AMERICA,

Petitioner,

v.

SUN-DIAMOND GROWERS OF CALIFORNIA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF OF THE UNITED STATES

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REPLY BRIEF OF THE UNITED STATES

I. Section 201(c)(1)(A)'s Requirement That A Thing of Value Be Given "For or Because of Any Official Act" May Be Satisfied By A Showing That The Thing Of Value Was Motivated By The Recipient's Official Position

In its opening brief, the Government demonstrated that 18 U.S.C. § 201(c)(1)(A)'s requirement that a thing of value be given "for or because of any official act" can be satisfied by a showing that the giving was motivated by the recipient's official position, where "official position" is understood to mean being in a position to take official action affecting the donor. To hold otherwise would write forward-looking gratuities out of the statute and effectively erase the line between bribes and gratuities. Rather than directly addressing the Government's position, respondent and the *amici* supporting it argue the simplistic position that "official position" and "official acts" are not the same thing.

Instead of answering the question the Court posed, respondent and its supporters ask the Court to rewrite the

statute. In place of gifts given "for or because of any official act," they want the statute limited to prohibiting gifts given "to influence a specific official act." Such a restriction on the statute would not only defy its plain language but also undermine the enforcement scheme that Congress crafted.

A. Neither The Plain Language Of The Gratuities Statute Nor The Existence Of Broad Administrative Gift Regulations Supports Respondent's Position

1. A glaring irony pervades the briefs of respondent, the American League of Lobbyists (ALL), and the National Association of Criminal Defense Lawyers (NACDL). Although all three argue strongly for a "plain meaning" interpretation of 18 U.S.C. § 201(c)(1)(A), they urge this Court to write into the statute restrictions that Congress did not include.

Congress forbade the giving of gratuities "for or because of *any* official act," and then defined "official act" in the broadest possible terms. Respondent, ALL, and NACDL, however, ask this Court to limit the statute's reach to gifts given "for or because of a *specific* official act."

Thus, respondent baldly asserts that "the unlawful gratuity is a reward for either an act 'performed' or a gift to make some *specific* future conduct more likely." Respondent's Brief at p. 23 (emphasis added). NACDL likewise rewrites the statute to conclude that "section 201(c)(1)(A) criminalizes only gifts motivated by a *specifically identified* official act." NACDL Brief at p. 18 (emphasis added). ALL goes even further, suggesting that "[g]ratuities not motivated by a '*specific* official action performed or to be performed' – ones that are not inevitably nefarious – do not merit criminal sanctions and may even be beneficial." ALL Brief at p. 4 (emphasis added).

Respondent and its supporters endorse a "specific act" requirement because it helps to blur the distinction between gratuities and bribes, a line already seriously eroded by the D.C. Circuit's decision. In reality, respondent, ALL, and

NACDL are exploiting the inconsistencies pervading the decision below. The court of appeals rejected the argument that "the jury should have been required to find that the gratuities were conferred with specific knowledge of a definite official action for which compensation was intended," because "leniency in a multitude of specific acts was enough." App. 13 (internal quotation marks omitted). However, it simultaneously found the statute to forbid only gratuities that "reward some past *concrete* official act or acts," or, looking to the future, "where the giver is motivated simply by the desire to increase the likelihood of one or more *specific*, favorable acts." App. 7-8 (emphasis added).

Respondent and its supporters go even further in attempting to blur the distinction between gratuities and bribes. Section 201 differentiates between the two by prohibiting as a gratuity anything of value given to a public official "*for or because of* any official act," and prohibiting as a bribe anything of value given to a public official "*with intent to influence* any official act." Where Congress uses particular language in one section of a statute but not another, the usual presumption is that it acted intentionally and purposely. *Russello v. United States*, 464 U.S. 16, 22-23 (1983). Nevertheless, respondent and the *amici* would have this Court erase this distinction.

Thus, respondent insists that "the plain statutory language [for the gratuity offense] prohibits only gifts given *with the intent to reward or to influence* some specific act or acts," and that the gratuity statute proscribes gifts "*to increase the likelihood* of one or more specific, favorable acts." Respondent's Brief at pp. 37, 36 (emphasis added). Similarly, ALL asserts that "in order to have committed a crime [under section 201(c)], the defendant must have acted *with the specific intent to influence* or reward some 'official act.'" ALL Brief at pp. 7-8 (emphasis added).[1]

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[1] NACDL and ALL would further limit the scope of section 201(c) to gifts given with "corrupt intent," an explicit requirement of the bribery

However, in outlawing gratuities to public officials, Congress forbade private individuals from giving gifts motivated by official action, regardless of the specificity with which those acts could be identified, and regardless of whether an intent to influence or any other corrupt intent could be shown. Instead of using the wording urged by respondent, Congress wrote exceedingly broad language that denotes a non-causal connection between the gift and actual or potential matters coming before the official – "for or because of" anything "which may at any time be pending, or which may by law be brought before any public official ... "[2] 18 U.S.C. §§ 201(c)(1)(A), 201(a)(3); *cf. Dixson v. United States*, 465 U.S. 482, 491-92 (1984) (Congress drafted §201 with "broad jurisdictional language" having "wide application"). The latter phrase is the precise language to which this Court gave an expansive interpretation in *United States v. Birdsall*, 233 U.S. 223 (1914), which neither respondent, ALL, nor NACDL even mention. *See* Brief of United States at pp. 20-21.

The facts of the present case well illustrate how respondent's recasting would undermine the statute Congress wrote. Sun-Diamond was a large agricultural cooperative, App. 1-2, and the Department of Agriculture's actions profoundly affected its business in a variety of matters. *See, e.g.*, Gov't.Exh. 480, Joint Appendix filed in Court of Appeals, ("C.A.J.A.") Tab 39 and Tab 3, pp. 380-81. From the outset of Secretary of Agriculture Espy's tenure, it was apparent that official actions he would take in the performance of official duties would affect Sun-Diamond. The indictment alleged and the Government proved, *inter alia*, two such actions – regulatory definitions under the market promotion program, and regulatory input concerning methyl bromide – which involved millions of dollars of potential benefits to Sun-Diamond. *Id.*; Gov't.Exh. 292, C.A.J.A. Tab 34 and Tab 3, p. 168; App. 3-4. But under the

statute not found in the gratuity statute. *See* NACDL Brief at p. 23; ALL Brief at p. 3.

[2] *See* House Rep. No. 748 (87th Cong., 1st Sess., July 20, 1961) at 15 ("'Official Act' means any decision or action pending before or which may come before a public official.")

terms of the statute Congress wrote, it does not matter whether the gratuities were given for or because of these particular official acts, or instead for or because of the myriad official acts affecting Sun-Diamond that the Secretary would inevitably take during his tenure, many of which could not be identified with any specificity at the time the gifts were given. If Sun-Diamond gave gifts to Secretary Espy because he was in a position to help it through his official acts, then it gave gifts "for or because of *any* official act," regardless of whether it gave gifts "*with intent to influence* or reward a *specific* official act."

2. The foregoing explains why the Government answered the Question Presented, as this Court phrased it,[3] with a qualified "Yes." Where, as here, the donor gives gifts because the recipient is in a position to perform official acts to its benefit, then the gifts were given "for or because of any official act." Indeed, the statutory definition of "official act" includes anything "which may by law be brought before any public official, *in such official's official capacity*, or *in such official's place of trust or profit.*" 18 U.S.C. § 201(a)(3). If, on the other hand, the donor gives gifts merely to celebrate the recipient's status, or to honor the recipient, or purely out of friendship, then the gift is not "for or because of any official act," and not within the prohibition of the statute.

Respondent, ALL, and NACDL, however, ignore this distinction, pretending that the Government does not differentiate between "official position" and "official acts." Through this device, they try to reduce the Government's position to a quibble over semantics, characterizing it as an assertion that "X = Y." Respondent's Brief at p. 12. Respondent argues further that one cannot substitute the phrase "official position" for "official act" in the bribery statute. Respondent's Brief at p. 15. But, of course, the Government does not try to equate "position" with "act," or to substitute one

[3] "Is the requirement in 18 U.S.C. Sec. 201(c)(1)(A) that a thing of value be given 'for or because of any official act' satisfied by a showing that the giving of a thing of value was motivated by the recipient's official position?"

word for the other. Rather, it has responded to the Court's question with the answer that in some circumstances the official act required by the statute can be shown by reference to the recipient's official position, and in some circumstances – because of the giver's lawful motives – it cannot.

Respondent and its supporters never address the question presented. They argue the tautology that "official position" is not the same thing as "official acts," but they do not state whether, and under what circumstances, the requirement that the gratuity be given "for or because of any official act" can be *satisfied* by a showing that the giving was motivated by the recipient's position.

If a conviction under section 201(c)(1)(A) cannot in the future be maintained where a private person gives a public official gifts for or because of general, but not specific, official acts, then the statute would be a dead letter in the control of corruption. Absent an explicit *quid pro quo*, which would turn a gratuity into a bribe, every defendant will seek refuge in a claim that gifts were given for the purpose of building "generalized sympathy."[4] The fact that such "generalized sympathy" is of value to the donor only because the official is in a position to take acts in the future to the donor's benefit – i.e., that matters of interest to the donor "may by law be brought before any public official, in such official's official capacity," 18 U.S.C. § 201(a)(3) – is of no moment under the decision below, or in the result urged by respondent and its supporters.

3. Ultimately, respondent, ALL, and NACDL fail to give credence to the breadth of the statutory definition of "official act." The most blatant example of this strategy is

[4] Indeed, as the United States' Opening Brief noted at p. 42, at least one district court has applied the D.C. Circuit's decision to overturn a jury verdict against a lobbyist for a major agricultural concern who gave gratuities to the Secretary of Agriculture despite the concession that the gifts were given "to win generalized sympathy," because the particular acts for which the gratuities were given were too inchoate at the time of giving. *United States v. Williams*, 29 F. Supp.2d 1, 6-7 (D.D.C. 1998).

respondent's suggestion that gifts from a lobbyist to a public official may be motivated not by official action but by the lobbyist's effort to gather intelligence. Respondent's Brief at p. 18.[5] What this assertion ignores is that, to the extent a lobbyist is using gratuities to induce the recipient to meet with him or dispense helpful information, he is buying "official acts" within the broad statutory definition. Lobbyists, like anyone else, have a right to seek information from the government, but on the face of the statute, Congress was no more tolerant of private individuals giving gifts in recognition of preferential access to information than it was of the giving of gratuities for or because of any other form of official action. The statute does not tolerate the use of private wealth to pay for public acts.[6]

4. A practice common to respondent, ALL, and NACDL is to illustrate the supposed need to rewrite the statute through extreme hypotheticals. Respondent's Brief at pp. 20, 41-42; ALL Brief at pp. 10-11, 13; NACDL Brief at p. 22. The general pattern is to posit a trivial gift (brownies or a hand-knit sweater) from an apparently naive donor (a senior citizen or a high school student), and then to use the apparent unfairness of prosecuting the "offense" as a springboard for arguing for the insertion of a specificity requirement into the statute. A variation is to conjure up an old friend continuing

[5] ALL, in contrast, appears to acknowledge that a lobbyist's role is "to seek to influence government." ALL Brief at p. 2.

[6] On the other hand, strict application of section 201(c)(1)(A) would not implicate any First Amendment concerns. *See* ALL Brief at pp. 21-27. ALL grudgingly concedes that "gift-giving per se may not be constitutionally protected . . . . " *Id.* at 25. Undoubtedly, private individuals have a "right to seek to influence government," ALL Brief at p. 2, but that is a right to persuade an official, not to purchase his sympathy. Nor would the correct application of the statute prohibit or discriminate against speech on the basis of content. *Cf. Buckley v. Valeo*, 424 U.S. 1, 30-33 (1976) (statutory spending limits on campaign contributions to candidates do not discriminate against speech based upon content but instead impose evenhanded and equal restrictions). While the statute restricts the opportunities of a lobbyist (or anyone else) to buy access to government officials, it does not foreclose access to anyone.

the practice of hosting a government official. Of course, respondent and its supporters resort so frequently to extreme hypotheticals because they cannot find a reported case in which "ordinary citizens" actually ran afoul of the statute, notwithstanding the broad interpretation it has received for over thirty years.

The hypotheticals do not advance respondent's position because the apparent unfairness of prosecution upon which they are premised springs from the peculiar factual circumstances assumed, rather than from the reason for the gift, which is generally not identified. Under the Government's view of the law, a senior citizen giving a small gift to a public official because he is in a position to take action in her favor would violate the law; under respondent, ALL, and NACDL's view of the law, a senior citizen giving a small gift to an elected official to influence in any way a stand he might take on a specific issue (like Social Security) would violate the law. Neither would be a sensible violation to prosecute, because it is *de minimis*, and prosecutorial discretion would ordinarily dictate that the case not be pursued. However, the critical point is that the potential for the prosecution of picayune gratuities flows from the fact that the statute has no stated minimum, and this potential will remain even if this Court accepts respondent's invitation to write new limitations into the statute.[7]

This case, of course, is not about sweaters or brownies donated by starry-eyed constituents. It is about a major agricultural cooperative, that stood to benefit from millions of dollars in discretionary federal spending, giving nearly $6000 in gifts to its chief governmental regulator, the Secretary of Agriculture. And, in the view of the briefs supporting

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[7] In a few of the hypotheticals, the recipient of the gratuity is an elected official. Things of value provided to elected officials, at least when they can be characterized as campaign contributions, can implicate special concerns that are not present in the instant case. The D.C. Circuit recognized this distinction in *United States v. Brewster*, 506 F.2d 62, 78, 81-82 (D.C. Cir. 1974), but abandoned it in the decision below. App. 8-9.

respondent, it would have made no difference if that cooperative had given the Secretary a million dollars in cash. Under respondent's interpretation of section 201(c)(1)(A), so long as the donor can claim that it gave the gift for generalized goodwill (i.e., the hope of yet unidentified favorable acts in the future), rather than for a specifically identifiable act, the donor can shower gifts on the official without limit, and the official can pocket them without any consequences (other than civil administrative actions).

The fact that almost none of these hypotheticals specify why the gift was given renders them useless to analyze the problem at hand. In almost every one of the few instances in which the reason for the gift *is* specified, the result would be the same regardless of whether the courts applied the standard proposed by the Government (satisfying the official act requirement with a showing that the giving was motivated by the official's being in a position to take action affecting the donor) or respondent's position (limiting the statute to situations where the donor attempts to influence a specific official act.)

The one exception, appearing at page 42 of the respondent's Brief, is a recasting of the hypothetical appearing at pages 20 to 21 of the Department of Justice's Brief. In respondent's version, an otherwise law-abiding citizen gives a United States Attorney gifts in hopes of obtaining unspecific beneficial assistance in the future. In other words, the gift is given because the official is in a position to take official action that affects the donor, but is not given to influence a specific act. Thus, the gifts are unlawful gratuities under the Government's view of the statute, but lawful under respondent's. The problem with respondent's interpretation is well illustrated by the Department of Justice's original version of this hypothetical, which posited the donor as an organized crime figure but otherwise assumed the same facts. Since liability under the statute must turn on the reason the gift was given, rather than the overall probity of the giver, respondent's version of the law necessarily endorses organized crime figures buying generalized favor from law enforcement officials.

5. The administrative regulations (5 C.F.R. § 2635.101 *et seq.*) to which respondent, ALL, and NACDL repeatedly compare the statute are not a substitute for section 201(c)(1)(A). Congress's creation of an administrative regimen to govern a class of offenses does not impliedly repeal a pre-existing criminal statute covering the same type of activity. *United States v. Hansen*, 772 F.2d 940, 944-48 (D.C. Cir. 1985) (Scalia, J.).

The briefs in support of respondent make much of the fact that the regulations contain numerous safe harbors (such as exclusions for gifts with value below $20, and for refreshments at speaking engagements) that the statute does not. But the briefs fail to note that these safe harbors are, in general, incorporated into the enforcement of section 201. Section 201(c)(1) forbids gratuities given "otherwise than as provided by law for the proper discharge of official duty . . . ." The Ethics Reform Act of 1989, the wellspring of the administrative regulations on which respondent and its supporters rely, explicitly permits the receipt of a gift that is allowed under the administrative regulations, so long as the gift is not accepted for being influenced in the performance of any official act. 5 U.S.C. § 7353(b). The safe harbors in the administrative regulations thereby create corresponding safe harbors in section 201(c). *See United States v. McDade*, 827 F.Supp. 1153, 1173 (E.D. Pa. 1993); 5 C.F.R. § 2635.202 (1992) ("Unless accepted [in return for being influenced in the performance of official acts], a gift accepted under the standards set forth in this subpart shall not constitute an illegal gratuity otherwise prohibited by 18 U.S.C. § 201(c)(1)(B)."); BIPARTISAN TASK FORCE ON ETHICS, 101st CONG., REPORT ON H.R. 3660 ("Ethics Report"), at 12 (Comm. Print 1989) ("This statutory authority would bar any possible prosecution under the illegal gratuities statute for acceptance of a gift of minimal value that may bear some relation to official

action."); 135 CONG. REC. H8758 (1989) (statements of Rep. McCollum and Rep. Fazio).[8]

In any event, to whatever extent the regulations might recognize safe harbors that the statute does not, rewriting the statute's intent requirement would not alter the result. A small gift given with the requisite intent will trigger the statute, despite its seeming triviality, regardless of whether the requirement is the statutory "*for or because of any* official act" or respondent's proposed rewrite of "*with intent to influence a specific* official act." Even if Congress did give the statute a broader sweep than the regulations, this is a concern to be addressed by Congress, not this Court.

The administrative regulations and 5 U.S.C. §7353 are important adjuncts to the gratuities statute, but they are not a substitute for it. For one thing, they govern only the recipient official, not the donor; they would not have touched respondent. Additionally, they impose broad strict liability for the acceptance of gifts from certain persons, irrespective of the motivation behind those gifts. Most importantly, the regulations do not, and cannot, carry out what Congress saw as an important policy of attaching criminal, and not just civil, consequences to activities that can compromise governmental processes.

6. In the end, respondent is left seeking refuge in the rule of lenity. Respondent's Brief at pp. 44-45. But this rule is only applicable if the Court is left with an ambiguous statute after exhausting all sources of interpretive aid. *Moskal v. United States*, 498 U.S. 103, 108 (1990). It does not apply "merely because it [is] possible to articulate a construction [of

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[8] While crafting the Ethics Reform Act, Congress recognized that section 201(c) applied to de minimis gifts and that the Department of Justice had taken the "expansive view that gifts of appreciation or goodwill may be subject to prosecution under [section 201(c)]." Ethics Report at 8. Yet, while Congress chose to create a safe harbor for de minimis gifts, it left goodwill gifts of more than nominal value within the broad reach of section 201(c). *See id.* at 12; Ethics Reform Act of 1989, Pub. L. No. 101-194, 103 Stat. 1716.

the statute] more narrow than that urged by the government." *Id.* To hold otherwise would allow every defendant challenging a statute's interpretation to invoke the rule. Because a reasonable doubt as to the statute's intended scope does not endure a review of "'the language and structure, legislative history, and motivating policies' of the statute," the rule of lenity is unavailable to respondent. *Id.* (quoting *Bifulco v. United States*, 447 U.S. 381, 387 (1980)).

B. The Legislative History Relied Upon By Respondent Is Of No Value In Determining The Breadth Of Section 201(c)

While purporting to agree that legislative history cannot override the statute's plain meaning, respondent and its supporters rely heavily on snippets of legislative activity on the subject of bribery and corruption reform in the late 1950s and early 1960s. Predictably, they approach the legislative history of section 201(c)(1)(A) by emphasizing what Congress did not do, rather than what it did. They lean heavily on the suggestion of a more general provision floated by Senator Keating, while glossing over the fact that Senator Keating never introduced his proposed amendment, thus foreclosing any possibility of discerning anything about Congress's intent from its failure to enact the proposal. Likewise, respondent points to a bill offered to the 85th Congress in 1958 as some type of guide to the legislative intent of the 87th Congress, which passed the statute in 1962. Respondent's Brief at p. 27.

The briefs of respondent, ALL, and NACDL also gloss over the fact that the Keating proposal was much broader than the interpretation of section 201(c)(1)(A) urged here by the United States, in that it forbade soliciting or receiving gifts from someone who the recipient "has reason to believe" is seeking favor. Respondent acknowledges that the proposal "would hold public officials strictly liable for soliciting or accepting certain gifts . . . ." Respondent's Brief at p. 28. Section 201(c)(1)(A), in contrast, is not under anyone's interpretation a strict liability statute – it requires that the

thing of value be given "for or because of any official act," a requirement that can be met, in appropriate circumstances, by a showing that the thing of value was motivated by the recipient's official position.

C. The Broad Language Of The Gratuities Statute Protects The Public From A Division Of Loyalties By Its Officials

The courts of appeals have repeatedly recognized that, when a private entity becomes a second source of income for a public official in a position to perform official acts in which it has an interest, the resulting division of loyalties is precisely what Congress addressed through section 201(c)(1)(A). *United States v. Bustamante*, 45 F.3d 933, 940 (5th Cir. 1995); *United States v. Gorman*, 807 F.2d 1299, 1304 (6th Cir. 1986); *United States v. Evans*, 572 F.2d 455, 480 (5th Cir. 1978); *United States v. Irwin*, 354 F.2d 192, 196 (2d Cir. 1965).[9] In particular, the Third Circuit recognized, in a

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[9] The principle that public officials should be forbidden to accept gifts that could divide their loyalties goes back to the earliest common law origins of the law of bribery, which proscribed officials' receipt of gifts from persons with matters before them:

> And to the intent that our Justices should do even right to all People . . ., without more favour shewing to one than to another, We have ordained and caused our said Justices to be sworn, that they shall not . . . take Fee nor Robe of any Man . . . , and that they shall take no Gift nor Reward by themselves, nor by other, privily nor apertly, of any Man that hath to do before them by any Way, except meat and drink, and that of small value . . . .

20 Edwardi, III. c.1 (1346) *reprinted in* STATUTES OF THE REALM, Vol. 1, pp. 303-04 (William S. Hein & Co., Inc. 1993). In certain situations, the common law's proscription against gifts to judicial officials reached the donor as well. *See* Henry III: The Provisions of Oxford (1258) ("no bailiff, by virtue of his office or of some plea, shall take any fee . . . And if he is convicted. . . . let him be punished; likewise the man who gives [the fee]") *reprinted in* Stephenson, C. and Marcham, F.G. (eds.), SOURCES OF ENGLISH CONSTITUTIONAL HISTORY, Vol. 1, p. 145 (Harper & Row, rev.ed. 1972). *See also Perrin v. United States*, 444 U.S. 37, 43 (1979) (by time of Blackstone, crime of bribery covered judges and other judicial

decision that this Court affirmed (albeit without discussion on this point), that "[a]ll that was required in order to convict [the donor] was that the jury conclude that the gifts were given by him for or because of [the recipient's] official position, and not solely for friendship or social purposes;" the most telling evidence of this fact, again according to the Third Circuit, was the donor's admission that he gave the gifts "to establish rapport" with the recipient official. *United States v. Standefer*, 610 F.2d 1076, 1080-81 (3d Cir. 1979) (*en banc*), *aff'd* 447 U.S. 10 (1980).

Respondent dismisses the unlawful compensation rationale behind section 201(c)(1)(A) by referencing 18 U.S.C. § 203, another statute aimed at preventing federal officers and employees from taking outside compensation. Respondent's Brief at pp. 23-24, n.14. But this argument is a *non sequitur*; section 203 is not a substitute for section 201(c)(1)(A), and, if anything, strengthens the notion that a congressional purpose to deter unlawful compensation at least in part motivated this entire body of conflict of interest law.

Indeed, in interpreting another unlawful compensation statute, 18 U.S.C. § 209 (characterized along with section 201 as "one of almost two dozen statutory provisions addressing bribery, graft, and conflicts of interest that were revised and compiled at Chapter 11 of the Criminal Code in 1962," *Crandon v. United States*, 494 U.S. 152, 158-159 (1990)), this Court explained the legitimate breadth of this type of legislation:

> Congress appropriately enacts prophylactic rules that are intended to prevent even the appearance of wrongdoing and that may apply to conduct that has caused no actual injury to the United States. * * * * * Legislation designed to prohibit and to avoid potential conflicts of interest in the performance of governmental service is

officials and included giver as well as receiver of bribe), *citing* 4 W. BLACKSTONE, *Commentaries* 139-140 (1765)).

> supported by the legitimate interest in maintaining the public's confidence in the integrity of the federal service.

Id. at 164-65 (footnote omitted).

The crucial point, ignored by respondent and its supporters, is that a hair-splitting distinction between gratuities given for or because of an official act and those given for or because an official is in a position to perform an official act destroys Congress's carefully-crafted delineation between bribes and gratuities. As Judge Wald pointed out, this proposed distinction "would not pass the snicker test with laymen," App. 34, a conclusion neither respondent nor its supporters even attempt to dispute.

II. Even Assuming Error In The Jury Instructions, Any Such Error Was Harmless

With regard to the jury instructions, neither respondent nor its supporters come to grips with the import of the instructions as a whole.[10] Moreover, respondent confuses instructions stating necessary elements of the Government's proof with sufficient elements. *See* Respondent's Brief at p. 19.

[10] To avoid the issue entirely, respondent argues that the Government has "waived" it by not raising it before. However, the Court can consider questions that were "pressed or passed upon below," *United States v. Williams*, 504 U.S. 36, 41-45 (1992). Here, the Court of Appeals held that "the charge failed to give the jury an adequate understanding of the issues, and the error cannot be called technical or harmless." App. 13 (citations omitted). Furthermore, the Court will receive and review closely related theories that are "fairly embraced" within the petition. *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995). The question presented requires a determination of whether an element of the offense was *satisfied* with proof that the giving of the thing of value was motivated by the Secretary's official position. Thus, an appropriate review of the jury instructions necessarily entails conducting a harmless error analysis. Moreover, the Government notes that respondent urges this Court to craft the proper form of the instructions. Respondent's Brief at pp. 11-12.

Respondent asserts that "the *only* defense allowed to be presented to the jury was that Sun-Diamond acted out of pure friendship." Respondent's Brief at p. 48 (emphasis in original). Significantly, it gives no record citations for this bald assertion. In fact, respondent asked to present, and was allowed to present, numerous defenses: "friendship or social purpose" (App. 86, 89-90); no need to cultivate or develop a relationship (App. 89); gift was honorarium, not gratuity (*id.*); and lack of knowledge of gift (*id.*). Respondent was convicted, not because it could not present defenses to the jury, but because the jury did not accept its defenses.

CONCLUSION

For the foregoing reasons, the United States respectfully requests that the Court reverse the judgment of the D.C. Circuit, and reinstate respondent's conviction for violating the unlawful gratuity statute, 18 U.S.C. § 201(c)(1)(A).

Respectfully submitted,

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